Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

MAREMONT CORPORATION,

Petitioner,

v.

FLORENCE DIANE ST. JOHN, Individually and as Administratrix ad Prosequendum of the Estate of HAROLD ST. JOHN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit erred in holding that a defendant waived its right to remove a diversity case to federal court where the defendant filed a notice of removal less than six hours after the unexpected dismissal of the only non-diverse co-defendant and the brief delay was explained by defendant's need to confirm the removability of the case.

PARTIES TO THE PROCEEDING

In addition to the parties in the caption, the following parties were defendants below:

Affinia Group, Inc.
Arvin Industries, Inc.
Borg-Warner Morse TEC
Bosch Braking Systems Corp.
Brake Parts, Inc.
Carlisle Companies, Inc.
Chrysler Motors, LLC
Dana Corp.
EIS Brakes
Ford Motor Co.
General Motors Corp.
Honeywell International, Inc.
National Automotive Parts Association
National Gasket Co.
Pneumo-Abex, LLC
Toyota Motor Sales, USA, Inc.
Trane US, Inc.
Western Auto Supply Co.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Maremont Corporation states that ArvinMeritor, Inc. is its parent corporation and owns 100% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Maremont Corporation respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the court of appeals, Pet. App. 1a, is unreported. Its decision denying the petition for rehearing and rehearing en banc, Pet. App. 11a, is unreported. The order of the district court, Pet. App. 9a-10a, is unreported. The district court's decision granting a stay of its order pending appeal, Pet. App. 2a-8a, is reported at 2009 U.S. Dist. LEXIS 47787.

JURISDICTION

The court of appeals issued its order on September 3, 2009. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on October 8, 2009. *Id.* at 11a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332, which provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States; ...

28 U.S.C. § 1441, which provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State

> court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending....
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

The decision below conflicts with decisions of other courts of appeals on the legal standard that governs whether a defendant, through conduct in the state court litigation, has waived the statutory right to remove a case to federal court. While other federal courts have held that any such litigation-based waiver must be "clear and unequivocal," the Third Circuit held that petitioner waived its removal rights in a situation where petitioner clearly and unequivocally *asserted and pursued* its right to a federal forum by investigating the basis for and seeking removal within six hours of first becoming aware of the possible ground for removal. This decision simply cannot be squared with a defendant's statutory entitlement to remove diversity cases to federal court and the purposes of federal diversity jurisdiction. In addition, this decision presents an issue of national importance because of the need to

ensure that the standard for waiver is applied evenly across the country and to ensure that defendants in cases that become removable due to changed circumstances during litigation are not deprived of the right Congress expressly granted them to a federal forum.

A. Factual Background.

This case is a claim for personal injuries arising from Harold St. John's alleged exposure to asbestos. The action was commenced on June 19, 2008 against Maremont and several other defendants in the Superior Court of New Jersey, Middlesex County. Because complete diversity did not exist among the defendants when the case was filed, Maremont did not attempt to remove the case to federal court.

The case proceeded to trial and the parties appeared for jury selection on May 26, 2009. Before jury selection commenced, at approximately 9:00 a.m., plaintiff's counsel announced that plaintiff had reached a settlement with co-defendant Honeywell, a company headquartered in New Jersey, and the court dismissed Honeywell from the action. Maremont then realized for the first time that the case was potentially removable because it appeared that none of the remaining defendants was either incorporated in New Jersey or had its headquarters there, thus creating complete diversity.

Maremont spent the next few hours confirming that complete diversity existed (an investigation that Maremont was obligated to perform by Fed. R. Civ. P. 11) and that review was not completed until 12:50 p.m. Maremont then attempted to obtain the consent of all remaining defendants for removal. At 2:54 p.m., less than six hours after it first learned the surprising news that a basis for removal possibly

existed, Maremont electronically filed a Notice of Removal ("Notice") with the United States District Court for the District of New Jersey and then filed the Notice with the state court clerk at 2:59 p.m. The time-stamped Notice was then served upon the state court judge and all of the parties at the trial.

During this time, jury selection proceeded in the state trial court. When Maremont's trial counsel learned after lunch that Maremont would file for removal, he remained in the courtroom but did not ask for any strikes for cause. After the notice of removal was filed, the state trial court continued with jury selection. Maremont's trial counsel remained in the courtroom but did not ask for any peremptory strikes; the court deemed his nonparticipation in the peremptory strike process to indicate that he was "passing" or accepting the jurors. A complete jury was not selected that day (and the partial jury was released several days later).

B. Proceedings Below.

The next day, May 27, 2009, plaintiff filed in the district court a proposed order requiring Maremont to show cause why the matter should not be remanded to the state court. At 2:00 p.m., less than two and one-half hours after Maremont was served with plaintiff's papers and without any opportunity to file a written response, the Honorable William J. Martini, U.S.D.J., conducted a conference call with all the parties and the state judge. During this call, Judge Martini announced that he would remand the matter and issued a remand order on May 29, 2009. Pet. App. 9a-10a.

Maremont promptly filed a notice of appeal of the remand order in the Third Circuit and also asked the district court to stay its remand order pending the

appeal. The district court granted the stay. Pet. App. 2a-8a. In its written order on the stay motion, the district court discussed the basis for its remand order. It explained that the removal was "jurisdictionally proper" on diversity grounds, but that it had remanded the case based on a finding that Maremont had waived its right to remove the case by "proceed[ing] with trial in state court" while "simultaneously preparing to remove the case to federal court." *Id.* at 5a. The district court found that it was "incumbent upon Defendants to notify the state court and ask for a brief adjournment as soon as they began contemplating removal. Even if their request had been denied, merely asking would have preserved the right." *Id.* at 7a. By "not tell[ing] the state court of its plans until six hours later," the district court concluded, defendants were able to "evaluate the potential jury pool and then decide whether or not to remove." *Id.*

On June 25, 2009, prior to any briefing on the appeal, plaintiff filed a motion in the Third Circuit to remand the case to the state court or, in the alternative, to dismiss the appeal, arguing that (1) Maremont's removal was procedurally defective because the Notice lacked certain attachments; and (2) the Third Circuit lacked jurisdiction to review the remand order. Plaintiff had not raised the first issue in the district court and, as a result, the district court never addressed it. As to the second issue, the district court specifically concluded in its order granting the stay pending appeal that its remand order was reviewable on appeal. Pet. App. 5a (finding that 28 U.S.C. § 1447 "does not preclude review of an order that was based upon a court's discretionary decision to remand a case" and citing *Carlsbad Tech. Inc.* v. *HIF Bio, Inc.*, 129 S. Ct. 1862, 1867 (2009)).

After briefing, but without hearing argument, the motions panel issued an order on September 3, 2009 (the "Third Circuit Remand Order"), Pet. App. 1a, which granted the plaintiff's motion "to the extent that, for essentially the reasons provided by the District Court, this matter is REMANDED to the Superior Court of New Jersey, Middlesex County, for further proceedings."[1] As noted, the sole basis on which the district court remanded the case was its finding that Maremont had waived its right to remove the case to federal court. Accordingly, the Third Circuit's Remand Order summarily affirmed the district court's waiver ruling. By virtue of this disposition based on plaintiff's motion, however, the Third Circuit resolved Maremont's appeal without ever giving it the opportunity to brief its challenges to the district court's waiver ruling.[2]

The Third Circuit denied rehearing and rehearing en banc, and also denied Maremont's motion to stay the mandate pending the filing of this petition. The state trial court has assigned a new trial date of January 19, 2010.

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[1] The Third Circuit also denied as moot Maremont's motion to expand the record on appeal to include a transcript of the proceedings in the state court on May 26, 2009, the day that Maremont removed the case. Pet. App. 1a.

[2] In remanding the case, the Third Circuit correctly rejected the plaintiff's alternative argument that it should dismiss the appeal for lack of jurisdiction. *Carlsbad Tech., Inc.*, 129 S. Ct. 1862. In *Carlsbad*, this Court expressly held that 28 U.S.C. § 1447(d) does not bar appellate review of a remand order based upon a district court's "purely discretionary" decision to remand a case. *Id.* at 1866. As the district court acknowledged, it ordered a remand "on the grounds of waiver [as] an exercise of discretion." Pet. App. 5a-6a. Accordingly, the remand order in this case falls squarely within the class of orders that this Court found in *Carlsbad* to be subject to appellate review.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The decision below merits review because it conflicts with the decisions of other courts of appeals. See Sup. Ct. R. 10(a) (a consideration favoring review on certiorari is where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"). The Third Circuit Remand Order affirmed the district court's ruling that Maremont waived its right to removal, Pet. App. 1a; no other court of appeals would find waiver in the circumstances posed in this case.

Under the removal statute, a defendant is "entitled to have [a] suit removed to a proper federal court as a matter of right," and "[i]f the requirements of the removal statute are met, the right to removal is absolute." *Regis Assocs.* v. *Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990). Although the right to removal, like virtually all other rights, can be waived, other courts of appeals that have considered the question uniformly have held that mere participation in the state court litigation does not constitute a waiver – instead, the defendant must specifically waive its right to removal in a "clear and unequivocal" manner. See, *e.g.*, *Tedford* v. *Warner-Lambert Co.*, 327 F.3d 423, 428 (5th Cir. 2003) ("A waiver of the right to remove must be clear and unequivocal; the right to removal is not lost by participating in state court proceedings short of seeking an adjudication on the merits."); *Snapper, Inc.* v. *Redan*, 171 F.3d 1249, 1260-61 (11th Cir. 1999); *Aqualon Co.* v. *MAC Equip., Inc.*, 149 F.3d 262, 264 (4th Cir. 1998); *Resolution Trust Corp.* v.

Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1995); *Rothner* v. *City of Chi.*, 879 F.2d 1402, 1415 (7th Cir. 1989); see also 16 James W. Moore, *Moore's Federal Practice* § 107.18[3][a] (3d ed. 2009) (a defendant's "intent to waive the right to remove to federal court and to submit to state court jurisdiction must be clear and unequivocal, and the defendant's actions must be inconsistent with the right to remove").[3]

---

[3] Numerous district courts, in these circuits as well as other circuits, also have adopted the "clear and unequivocal" standard for determining whether a defendant waived its right to removal through its conduct in state court litigation. *See, e.g.*, *Stewart* v. *W. Va. Employers' Mut. Ins. Co.*, 2009 WL 2599306, at *3-4 (S.D. W. Va. Aug. 20, 2009); *Oster* v. *Standard Life Ins. Co.*, 2009 WL 1260174, at *1 (N.D. Cal. May 6, 2009); *Roper* v. *Saxon Mortgage Servs., Inc.*, 2009 WL 1259193, at *1 (N.D. Ga. May 5, 2009); *Schoen* v. *Presbyterian Health Plan, Inc.*, 2009 WL 1299680, at *6 (D.N.M. Feb. 19, 2009); *O'Keefe* v. *State Farm Fire & Cas. Co.*, 2009 WL 95039, at *8 (S.D. Miss. Jan. 13, 2009); *Miranda* v. *Rodriguez*, 2009 WL 32746, at *1 (M.D. Ga. Jan. 2, 2009); *Al-Hilfy* v. *Rexnord Indus., LLC*, 2008 WL 4610022, at *2 (D. Neb. Oct. 15, 2008); *Ellis* v. *Coventry Capital I LLC*, 2008 WL 4396349, at *4 (N.D. Ill. Sept. 24, 2008); *Barabin* v. *Albany Int'l Corp.*, 2007 WL 4376181, at *2 (W.D. Wash. Dec. 12, 2007); *Nungesser* v. *Bryant*, 2007 WL 4374022, at *9 (D. Kan. Dec. 7, 2007); *Cavadi* v. *Bank of Am., N.A.*, 2007 WL 3226166, at *2 (D.N.H. Oct. 30, 2007); *Arthur L. Christoffersen Irrevocable Trust* v. *Yellow Book USA, Inc.*, 2006 WL 2925655, at *3 (N.D. Iowa Oct. 11, 2006); *Whitten* v. *Michelin Am. Research & Dev. Corp.*, 2006 WL 1645833, at *3 (W.D. Tenn. June 8, 2006); *Mattel, Inc.* v. *Bryant*, 441 F. Supp. 2d 1081, 1091 (C.D. Cal. 2005), *aff'd*, 446 F.3d 1011 (9th Cir. 2006); *Grievance Adm'r* v. *Fieger*, 409 F. Supp. 2d 858, 861 (E.D. Mich. 2005); *Louis Trauth Dairy LLC* v. *Risers Corp.*, 2002 WL 31951268, at *1 (S.D. Ohio Dec. 10, 2002); *Hernandez-Lopez* v. *Commonwealth of P.R.*, 30 F. Supp. 2d 205, 209 (D.P.R. 1998); *Bedell* v. *H.R.C. Ltd.*, 522 F. Supp. 732, 738 (E.D. Ky. 1981); *Swan* v. *Cmty. Relations-Social Dev. Comm'n*, 374 F. Supp. 9,

The Third Circuit's holding in this case, however, represents a clear departure from the legal standards applied by other courts of appeals.[4] The district court's "reasons" for finding waiver that the Third Circuit adopted made no mention of the "clear and unequivocal" standard, and the district court and the Third Circuit clearly did not apply that standard. Maremont plainly did not waive its right to removal in a "clear and unequivocal" manner. To the contrary, its conduct during the six hours that are at issue in this case revealed a "clear" and "unequivocal" intent to *assert* its removal rights: after first learning that the last remaining non-diverse defendant had settled, Maremont scrambled to prepare and file a notice of removal.

The Third Circuit nevertheless held that Maremont waived its right to removal based solely on the fact that it did not affirmatively tell the state court that morning that it might file a notice of removal later that day. This harsh outcome converts the waiver doctrine into a trap for the unwary and is squarely at odds with the "clear and unequivocal" standard applied by other courts of appeals. Those courts have recognized that important statutory rights cannot be forfeited by mere inadvertence; forfeiture requires actions that are knowing and voluntary and that manifest a clear intent to relinquish – not pursue – the federal forum.

11-12 (E.D. Wis. 1974); *DRI Mark Prods., Inc.* v. *Meyercord Co.*, 194 F. Supp. 536, 537 (S.D.N.Y. 1961).

[4] The Third Circuit's departure is particularly disturbing because it previously seemed to recognize the principles adopted by the other circuits. *See Foster* v. *Chesapeake Ins. Co.*, 933 F.2d 1207, 1217 n.15 (3d Cir. 1991). The court of appeals' finding of waiver in this case, however, indicates that *Foster* is no longer controlling in the Third Circuit.

Moreover, the Third Circuit's holding also conflicts with the holdings of other courts of appeals and lower federal courts that there can be no waiver until it is "unequivocally apparent" that the case is removable. See, *e.g.*, *Akin* v. *Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998) (defendant's actions in state court did not constitute waiver because they "were taken before it was unequivocally apparent that the case was removable"); *Vandeventer* v. *Guimond*, 494 F. Supp. 2d 1255, 1261-62 (D. Kan. 2007); *Cavadi* v. *Bank of Am., N.A.*, 2007 WL 3226166, at *2 (D.N.H. Oct. 30, 2007); *Nungesser* v. *Bryant*, 2007 WL 4374022, at *9 (D. Kan. Dec. 7, 2007); *Mattel, Inc.* v. *Bryant*, 441 F. Supp. 2d 1081, 1091 (C.D. Cal. 2005), *aff'd*, 446 F.3d 1011 (9th Cir. 2006); see also 16 *Moore's, supra* § 107.18[3][a] (it "must be unequivocally apparent that the case is removable" before a defendant can waive its right to remove). In contrast to these courts, the Third Circuit found waiver here, notwithstanding that much of the "delay" between the time Maremont learned that Honeywell had settled and the time it removed the case was attributable to Maremont's contacting other counsel to confirm that all other defendants were in fact diverse. Until Maremont completed this investigation a few hours later, the removability of the case was anything but "unequivocally apparent."

The divergent legal standards applied by the Third Circuit and other circuits have produced inconsistent outcomes on similar facts. In particular, the Third Circuit's finding of waiver in this case is squarely at odds with the outcomes of cases in other circuits in which a defendant's mere participation in state court proceedings has not been found to constitute waiver. For example, in *Grubb* v. *Donegal Mutual Insurance Co.*, 935 F.2d 57, 58-59 (4th Cir. 1991) – a case that

bears pertinent similarities to this one – the Fourth Circuit found no waiver where the state court dismissed the only non-diverse defendant at the outset of a summary judgment hearing and the remaining defendant participated in the hearing and did not file a notice of removal until a later date. The Fourth Circuit rejected the argument that the remaining defendant waived its right to removal by failing to assert that right "immediately" upon the dismissal and instead participating in the hearing, finding that the defendant's conduct at the hearing "did not show a 'clear and unequivocal' intent to waive its rights," particularly because the defendant's counsel "did not go to the hearing with any knowledge" that a possible basis for removal unexpectedly would arise. *Id.*

Similarly, in *Rothner*, the Seventh Circuit found no waiver after a defendant fully participated in a TRO hearing in a case that squarely raised a federal constitutional question and did not file for removal until almost a *week* later. *Rothner*, 879 F.2d at 1403-04, 1408, 1418-19. In *Akin*, 156 F.3d at 1036, the Tenth Circuit found that a defendant was not barred from removal simply by filing a motion for summary judgment in the state court because the defendant's actions in state court were taken "before it was unequivocally apparent that the case was removable." The Tenth Circuit explained that no waiver could be found "in the absence of adequate notice of the right to remove." *Id.*

Indeed, even in the context of contractual waivers of removal rights, where some courts of appeals do not require waivers to meet the rigorous "clear and unequivocal" standard, a number of courts of appeals have found mere silence as to a defendant's specific intentions on removal to be insufficient to constitute

a waiver. See, *e.g.*, *Regis*, 894 F.2d at 195-96 (no waiver of removal rights where forum selection clause only addressed "which country would be the forum for litigation" and "nothing in the language ultimately chosen ... suggests any intent on the part of anyone to waive the right of removal from state to federal court"); *Weltman* v. *Silna*, 879 F.2d 425, 427 (8th Cir. 1989) (no waiver of removal rights where party contractually consented to subject matter jurisdiction and venue in state court, but the contractual provision "did not address removal").

The Third Circuit's decision also is at odds with the outcomes of decisions of district courts in other circuits. For example, in one case, the defendant learned during *closing arguments* that the case had become removable, and the district court found no waiver despite the fact that the defendant did not state its intention to file for removal *until the following day* (at 2:00 p.m.), after jury deliberations had begun but before the jury had reached a verdict. See *Heniford* v. *Am. Motors Sales Corp.*, 471 F. Supp. 328, 335 (D.S.C. 1979). Similarly, in *Johnson* v. *Celotex Corp.*, 701 F. Supp. 553, 556 (D. Md. 1988), the district court found no waiver when, after weeks of trial, the case became removable and the defendant did not notify the court of its intention to remove *until the following day*. The court held that the "facts here indicate that defendant Celotex acted promptly and in full compliance with [§] 1446(b) when it indicated in state court that it intended to exercise its right of removal." *Id.* See also *Barabin* v. *Albany Int'l Corp.*, 2007 WL 4376181, at *1-2 (W.D. Wash. Dec. 12, 2007) (no waiver where defendant did not file a notice of removal for 12 days after case became removable, during which time defendant filed various motions, including their trial briefs).

In sum, it is plain that if Maremont's removal petition had been filed in a trial court in most, if not all, other circuits, its statutory right to removal would not have been forfeited by its mere participation in the jury selection. This is precisely the kind of decision by geography that this Court grants certiorari to prevent. The removal statutes deserve uniform interpretation and application; only this Court can ensure that they are applied consistently.

This case is an appropriate vehicle for resolving this circuit conflict because the facts governing the waiver issue are straightforward and undisputed. By granting this petition, this Court would provide meaningful guidance concerning when the right to remove is waived by litigation conduct.[5]

II. THE COURT OF APPEALS' WAIVER STANDARD FAILS TO VINDICATE DEFENDANTS' "ABSOLUTE" FEDERAL RIGHT TO REMOVAL.

The "clear and unequivocal" standard for waiver applied by other courts of appeals is the only standard that is faithful to the statute. As those courts have recognized, when properly invoked, a defendant's right to removal is "absolute." *Regis*, 894 F.2d at 195. In diversity cases, the "absolute" nature

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[5] The fact that the Third Circuit's decision is unpublished does not render this case an inappropriate vehicle for certiorari. This Court routinely grants certiorari with respect to unpublished decisions, particularly when those decisions squarely implicate circuit conflicts. *See, e.g., Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 430-31 (2001) (unpublished Ninth Circuit decision implicating circuit conflict); *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (unpublished Fourth Circuit decision implicating circuit conflict).

of the right is consistent with the important purposes that it serves: it gives defendants a "right to a federal forum," and the "motivating concern" is to "protect litigants against local prejudice, influence, and discrimination." *Rothner*, 879 F.2d at 1407. See *Guar. Trust Co.* v. *York*, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias."); see also *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546 n.6 (1995) ("the presupposition for diversity jurisdiction" is "a concern with local bias").

A federal right of this importance cannot be waived through inadvertence or a few hours' silence by counsel. A defendant must clearly and unequivocally, through affirmative actions or statements, assert its intention to remain in state court and forego the federal forum. As the Sixth Circuit has noted, "[t]he right of removal is statutory and, generally, it is the waiver of a statutory right that must be set forth, not the intent to rely on the statute." *Regis*, 894 F.2d at 195.

Indeed, the Third Circuit's harsh waiver standard is inconsistent with the specific provisions of the removal statute. Congress was well aware that cases could suddenly become removable in the middle of a proceeding due to "a change of parties as an action progresses toward trial in state court." H.R. Rep. No. 100-889, at 72 (1988). Congress dealt with this frequent occurrence through two specific provisions. First, to address changed circumstances generally, Congress provided that a defendant has *30 days* to file a notice of removal after receipt of a "copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one

which is or *has become* removable." 28 U.S.C. § 1446(b) (emphasis added). Second, for diversity cases specifically, Congress amended this subsection in 1988 to prohibit a defendant from removing diversity cases "more than 1 year after commencement of the action." *Id.*

Maremont fully complied with both of these statutory provisions – it filed its notice of removal the same day it learned the case had become removable (with 29 days and 18 hours to spare), and it filed within one year of the original commencement of the action. Under the Third Circuit's waiver standard, however, Maremont lost its "absolute" removal rights notwithstanding the fact that it immediately and hurriedly prepared the necessary removal papers over the course of a few hours. This result simply cannot be reconciled with Congress's more generous allotments of 30 days and one year. Moreover, given Congress's decision to address the issue of diversity jurisdiction arising after substantial proceedings have occurred in state court through a bright-line, one-year cutoff rule, a draconian waiver standard for cases that are within the one-year period – as the Third Circuit adopted here – is fundamentally misplaced.[6]

Thus, Maremont's actions here cannot be deemed a waiver of its right to removal under a reasonable interpretation of the statute. As other federal courts have correctly held, a defendant cannot be faulted

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[6] Indeed, some courts and authorities have questioned whether the judge-made rule that a defendant can waive its right to removal in litigation even survived Congress's 1948 enactment of a specific time period for filing a notice of removal when a case becomes removable in mid-course. *See, e.g., Rothner*, 879 F.2d at 1415 (quoting 1A *Moore's Federal Practice* ¶ 0.157[9], at 151 (2d ed. 1987)).

merely for participating briefly and defensively in the state court proceeding while it explores the possibility of removal. See *Grubb*, 935 F.2d at 58-59; *Rothner*, 879 F.2d at 1403-04, 1408, 1418-19; *Heniford*, 471 F. Supp. at 335; *Johnson*, 701 F. Supp. at 556. To be sure, as this Court noted in 1893 (long before § 1446's 30-day rule), "the spirit of the removal acts ... do[es] not contemplate that a [plaintiff] may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the Federal court." *Rosenthal* v. *Coates*, 148 U.S. 142, 147 (1893). But as the other federal courts have recognized, the sort of brief participation in state proceedings that took place here does not present such concerns. Jury selection was far from over when Maremont removed, and all of Maremont's actions here leave no doubt that its intention at all times was to remove the case as expeditiously as possible.

Moreover, a waiver standard that required a party to give the plaintiff and the court instantaneous advance notice that it intended to pursue removal would not further any valid purpose under the removal statute. In fact, it would undermine the important interests protected by removal because it would require all defendants to broadcast their litigation strategies to their opponents in order to retain their federal rights. The *Tedford* case illustrates the pitfalls of this approach. The defendant in *Tedford* gave advance notice of its intention to remove as a "professional courtesy," and the plaintiff responded by "quickly act[ing] to thwart" removal by adding a new non-diverse (and ultimately dismissed) defendant. *Tedford*, 327 F.3d at 428.

Even if Maremont sought to gain a strategic advantage by removing the case to federal court, such a tactic is not a ground for finding waiver. As the

Seventh Circuit has held, a "defendant's motive for removing is not a proper consideration for remand," because "*[e]very* defendant who removes considers the prospect of a favorable result in the federal forum." *Rothner*, 879 F.2d at 1408 (emphasis added). Indeed, the whole purpose of removal in diversity cases is now, as it has been for more than 200 years, to avoid the risk of an unfavorable forum in a state court and that risk obviously increases dramatically when the last defendant with any links to the state has been released from the litigation.

Finally, the flawed nature of the Third Circuit's waiver standard is further demonstrated by the fact that it bears no resemblance to the standard used to determine waiver of the right to arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* Federal courts repeatedly have held that the right to arbitrate cannot be waived merely by a failure to assert the right at the earliest possible moment. *E.g., Nicholas* v. *KBR, Inc.*, 565 F.3d 904, 907 (5th Cir. 2009) ("waiver of arbitration is a disfavored finding"); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 223 (3d Cir. 2007) ("waiver 'is not be to lightly inferred'"). Thus, "[a] presumption against waiver exists such that the party asserting waiver 'bears a heavy burden of proof in its quest to show' waiver." *Petroleum Pipe Ams. Corp.* v. *Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009). Delay in asserting the right to arbitrate, and participation in litigation, will not by themselves constitute waiver, absent a showing that the other party was prejudiced. *Forrester* v. *Penn Lyon Homes, Inc.*, 553 F.3d. 340, 343 (4th Cir. 2009); *Ehleiter*, 482 F.3d at 223; *Mercury Constr. Corp.* v. *Moses H. Cone Mem'l Hosp. (In re Mercury Constr.*

Corp.), 656 F.2d 933, 939 (4th Cir. 1981) (en banc), *aff'd on other grounds*, 460 U.S. 1, 24-25 (1983).[7]

Given the robust showing that must be made in order to demonstrate that a party has waived its right to arbitration, even where the party did not immediately assert the right, the Third Circuit's holding that the right to removal – which if anything is even more important to most litigants – can be waived through prompt and diligent efforts to *pursue* that right is completely misguided. It is a trap for the unwary and vindicates no purpose of the removal statute. For all of these reasons, the Third Circuit's holding warrants this Court's review.

III. THE COURT OF APPEALS' WAIVER RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The court of appeals' waiver ruling, and the circuit conflict that it implicates, also presents a recurring and "important question" of federal law that warrants this Court's attention. See Sup. Ct. R. 10(c).

As a general matter, this Court historically has taken a particular interest in ensuring that the standards for removal to federal courts are applied evenly across the country. This Court has granted certiorari in a number of cases to resolve conflicts about the legal standards governing removal; indeed, this Court granted certiorari in such a case just last month. See, *e.g.*, *Health Care Serv. Corp.* v. *Pollitt*,

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[7] *See also, e.g.*, *Rush* v. *Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985) ("defendants' delay in seeking arbitration during approximately eight months of pretrial proceedings is insufficient by itself to constitute a waiver of the right to arbitrate, for in addition, prejudice to [the plaintiff] must be demonstrated").

78 U.S.L.W. 3050 (U.S. Oct. 13, 2009) (No. 09-38) (order granting certiorari); *Carlsbad Tech. Inc.*, 129 S. Ct. 1862; *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Murphy Bros.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999); *Wis. Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 392 (1998); *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 709-11 (1996); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 126 (1995). See also *McNutt* v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 188 (1936) ("there should be a consistent practice in dealing with jurisdictional questions").

In addition, the specific removal issue presented here – whether the right to remove is waived by a defendant's litigation conduct in response to changed circumstances that have rendered a case removable for the first time – is one that frequently arises in diversity cases and that has considerable consequences for defendants' right to litigate such cases in federal court. As noted, the recurring nature of this issue was recognized by Congress when it amended the removal statute in 1988 to establish a one-year time limit on the removal of diversity cases. Congress recognized that many cases filed in state court are not removable when initially filed, but then become removable at a later stage of the proceedings due to "a change of parties as an action progresses toward trial in state court." H.R. Rep. No. 100-889, at 72. Indeed, Congress recognized the frequent occurrence of precisely the circumstance that arose in this case:

> The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction.... Settlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining

defendants to remove.

Id.

The recurring nature of this scenario is further increased by the widespread practice by plaintiffs of fraudulently joining in-state defendants to defeat diversity jurisdiction (although there is no indication that any such conduct occurred in this case). See, *e.g.*, E. Farish Percy, *Making A Federal Case Of It: Removing Civil Cases To Federal Court Based On Fraudulent Joinder*, 91 Iowa L. Rev. 189, 191-92 (Oct. 2005) (noting that "plaintiffs have long attempted to defeat removal to federal court by joining claims against in-state defendants" and that "[r]ecently, fraudulent joinder litigation has increased dramatically"). Although claims of fraudulent joinder are "escalating throughout the country" in many areas of litigation, the practice is particularly notorious in complex tort litigation, including products liability litigation. See *id.* at 192 (charges of fraudulent joinder are "fast becoming a prominent and time-consuming aspect of complex tort litigation"). In cases that are in state court as a result of fraudulent joinder, defendants can at any time learn facts that permit the inappropriate joinder to be eliminated.

Given this context where defendants in state court commonly learn that cases are potentially removable for the first time during pre-trial or trial proceedings as a result of new developments or new information, it is critically important that defendants' statutory and absolute right to remove cases to federal court be protected. Under the Third Circuit's waiver ruling, however, defendants can forfeit this right if they merely take the time to investigate and verify the removability of the case – as they are required to do

under Fed. R. Civ. P. 11[8] – and in no way manifest a knowing and voluntary relinquishment of their right to a federal forum. While this loss of removal rights through inadvertence is unacceptable in any context, it is utterly offensive in circumstances where the plaintiff deliberately avoided the federal forum through fraudulent joinder and the defendant merely sought to eliminate the fraud. If left standing, however, the inevitable result of the Third Circuit's decision will be further inadvertent losses of removal rights – a result that can only encourage fraudulent joinder. Accordingly, the Third Circuit's waiver ruling poses a recurring question of fundamental importance that warrants this Court's review.

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[8] *See* 28 U.S.C. § 1446(a) (a notice of removal must be signed pursuant to Rule 11).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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